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(erroneously named as JUDGE ROBERT ATTACK)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

BEVERLY THORP,

Plaintiffs,

V.

JUDGE ROBERT ATTACK, et al.,

Defendants.

Case No. C08-01449 JF

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF JUDGE
ROBERT ATACK'S MOTION TO
DISMISS
[FRCP 12(b)(1) & 12(b)(6)]**

Date: June 20, 2008
Time: 9:00 a.m.
Place: USDC Courthouse
280 South First Street,
Courtroom #3, 5th Floor
San Jose, California
Judge: Hon. Jeremy Fogel

20 Defendant JUDGE ROBERT ATACK (erroneously named as JUDGE ROBERT
21 ATTACK) (hereinafter “Judge Atack”) submits the following memorandum of points and
22 authorities in support of his motion to dismiss all claims for relief against him pursuant to Rules
23 12(b)(1) & 12(b)(6) of the Federal Rules of Civil Procedure.

I.

INTRODUCTION

26 By her complaint, Plaintiff Beverly Thorp brings this federal suit to request that Judge
27 Attack be disqualified and to have all of his “rulings and judgments” in her state law suit be
28 declared null and void. However, a federal district lacks subject matter jurisdiction to either

1 declare state court rulings or judgments null and void or disqualify a state court judge from a
 2 state court proceeding. To the extent that there is no final judgment and the underlying state
 3 court case is still ongoing, this Court should abstain pursuant to the *Younger* doctrine. Further,
 4 even if accepted as true, none of the above factual allegations asserted against Judge Atack in
 5 plaintiff's complaint give rise to any actionable claims and thus, this action should be dismissed
 6 pursuant to Rule 12(b)(6). Moreover, this action is not only barred by the Eleventh Amendment,
 7 but Judge Atack has judicial immunity for all of the acts plaintiff alleges that arise out of the
 8 exercise of his judicial functions. Thus, plaintiff's complaint fails to allege sufficient facts to
 9 establish subject matter jurisdiction and fails to state a claim in which relief can be granted
 10 against Judge Atack and, therefore, it should be dismissed pursuant to Rules 12(b)(1) & 12(b)(6)
 11 of the Federal Rules of Civil Procedure.

12 **II.**

13 **FACTUAL AND PROCEDURAL BACKGROUND**

14 On March 14, 2008, Plaintiff Beverly Thorp filed a complaint alleging, among other
 15 things, that commencing in January of 2007, Judge Atack was biased, was unprofessional, had a
 16 conflict of interest, did not allow her a fair hearing and violated her due process rights during the
 17 course of the state court proceedings in which she was a party, *System & Services Technologies,*
 18 *Inc. v. Beverly Thorp*, Santa Cruz County Superior Court Case No. CV 155983. (Complaint,
 19 Page 8, line 13 to Page 9, line 8; Exhibit 1). In addition to what plaintiff alleges in her thirty-one
 20 (31) page complaint, plaintiff attached an exhibit which contains eight separate declarations from
 21 a Dr. Gene Ritchey that appear to document his observations regarding the aforementioned state
 22 case along with his personal opinions and legal conclusions (Complaint, Exhibit 1).

23 Plaintiff's complaint is disjointed and unfocused making it difficult to understand
 24 precisely what occurred in the state court proceedings, the current status of the state court action,
 25 and the specific relief plaintiff is requesting in this suit. What is clear, however, is that plaintiff's
 26 complaint does not raise a federal question, does not assert diversity of citizenship, and fails to
 27 allege any specific claims for relief. Plaintiff merely identifies the "relief [r]equested" against
 28 Judge Atack, as follows:

1. Request that the United States District Court disqualify Judge Atack immediately and permanently (Complaint, Page 30); and
2. Request that the United States District Court declare all of Judge Atack's rulings and judgments null and void (Complaint, Page 30).

III.

ARGUMENT

A. Since Federal District Courts Lack Jurisdiction to Review Final State Court Judgments, Plaintiff's Action Should Be Dismissed

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a district court must dismiss an action if it lacks jurisdiction over the subject matter of the suit. Unlike a motion under Rule 12(b)(6), the Court is not required to accept all of the non-moving party's factual allegations as true. Instead, the party moving under Rule 12(b)(1) may submit evidence indicating that the court lacks subject matter jurisdiction. "It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." (*Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000) (noting that a district court "obviously does not abuse its discretion by looking to this extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes"')).

18 In this action, plaintiff requests that all of Judge Attack's rulings and judgments be
19 declared null and void. However, under the *Rooker-Feldman* doctrine, federal district courts lack
20 jurisdiction to review final state court judgments. (*See District of Columbia Court of Appeals v.*
21 *Feldman*, 460 U.S. 462, 482 n.16 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16
22 (1923)). With the exception of habeas corpus petitions, the *Rooker-Feldman* doctrine prohibits
23 district courts from "sit[ting] in direct review of state court decisions." (*Feldman*, 460 U.S. at
24 482 n. 16). The doctrine bars "a losing party in state court . . . from seeking what in substance
25 would be appellate review of the state judgment in a United States District Court, based on the
26 losing party's claim that the state judgment itself violates the loser's federal rights." (*Bennett v.*
27 *Yoshima*, 140 F.3d 1218, 1223 (9th Cir. 1998) (quoting *Johnson v. De Grandy*, 512 U.S. 997,
28 1005-06 (1994)).

1 The *Rooker-Feldman* doctrine derives from 28 U.S.C. § 1257, the statutory provision that
 2 grants the Supreme Court jurisdiction to review decisions of the highest state courts. Because the
 3 statute reserves jurisdiction exclusively to the Supreme Court, "it is improper for federal district
 4 courts to exercise jurisdiction over a case that is the functional equivalent of an appeal from a
 5 state court judgment." (*Ernst v. Child & Youth Servs.*, 108 F.3d 486, 491 (3rd Cir. 1997)). The
 6 doctrine precludes not only review of decisions of the state's highest court, but also those of its
 7 lower courts. (*See Dubinka v. Judges of Superior Court*, 23 F.3d 218, 221 (9th Cir. 1994)).

8 Here, Plaintiff's thirty-one page complaint with eight additional witness affidavits do not
 9 state a valid basis for subject matter jurisdiction because the case falls directly within the Rooker-
 10 Feldman doctrine. Plaintiff's complaint challenges Judge Atack's "[r]ulings and [j]udgments,"
 11 arguing that they violated her due process rights. By requesting that this Court invalidate those
 12 rulings and judgments, plaintiff is essentially trying to seek appellate review of them. The
 13 *Rooker-Feldman* doctrine clearly prevents this Court from granting Plaintiff's requested relief.

14 The mere fact that plaintiff's complaint references constitutional claims under 42 U.S.C.
 15 § 1983 does not correct the jurisdiction problem. (*See Worldwide Church of God v. McNair*, 805
 16 F.2d 888, 893 n.4 (9th Cir. 1986) ("Cases subsequent to *Feldman* make it clear that *Feldman*
 17 doctrine precludes district courts from considering constitutional claims that are "inextricably
 18 intertwined" with the state court's rulings. *Id.* at 891. A federal claim is considered "inextricably
 19 intertwined" with a state court judgment "if the federal claim succeeds only to the extent that the
 20 state court wrongly decided the issues before it." *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 25
 21 (1987) (Marshall, J., concurring)). In other words, "the district court does not have jurisdiction if
 22 it cannot evaluate the constitutional claims without conducting a review of the state court's legal
 23 determinations in a particular case." (*Lefcourt v. Superior Court*, 63 F.Supp.2d 1095, 1098
 24 (N.D.Cal. 1999)).

25 Plaintiff's complaint asks this Court to review and invalidate state court decisions. But
 26 the Court cannot evaluate plaintiff's federal complaint without, in effect, conducting an appellate
 27 review of the state court judgment. The fact that plaintiff references § 1983 in her complaint
 28 does not alter its fundamental nature. Because the Court does not have subject matter

1 jurisdiction to decide this matter, Judge Attack respectfully requests that his motion to dismiss be
 2 granted.

3 **B. To the Extent That Plaintiff's Complaint Incorporates Allegations
 4 Involving Any Ongoing State Court Proceeding, the *Younger*
 5 Doctrine Applies and This Case Should Be Dismissed**

6 From the allegations made in plaintiff's complaint, the status of the state court
 7 proceedings in which plaintiff was a party, *System & Services Technologies, Inc. v. Beverly*
 8 *Thorp*, Santa Cruz County Superior Court Case No. CV 155983, is somewhat unclear. If there
 9 was a final judgment in that matter, the *Rooker-Feldman* doctrine applies and the case should be
 10 dismissed for lack of subject matter jurisdiction. However, even if there is not yet a final
 11 judgment in the state court case, this federal action should be dismissed. To the extent that
 12 plaintiff's complaint references any pending state court action, this Court should dismiss this
 13 action pursuant to the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971).
 14 (See *Quakenbush v. Allstate Insurance Company*, 517 U.S. 706 (1996).) In *Younger*, the
 15 Supreme Court "espouse[d] a strong federal policy against federal-court interference with
 16 pending state judicial proceedings." (*H.C. v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2000) (citation
 17 omitted).) "Absent extraordinary circumstances, *Younger* abstention is required if the state
 18 proceedings are (1) ongoing, (2) implicate important state interests, and (3) provide the plaintiff
 19 an adequate opportunity to litigate federal claims." (*Id.* (citation omitted)). Here, plaintiff's
 20 complaint identifies no circumstances that would warrant federal court intervention. Therefore,
 21 to the extent that plaintiff's complaint incorporates allegations involving any ongoing state court
 22 proceeding, the *Younger* doctrine applies and this case must be dismissed. (*Id.*).

23 **C. Since Plaintiff's Complaint Alleges No Cognizable Legal Theory Against
 24 Judge Attack, It Should Be Dismissed Pursuant to Rule 12(b)(6) of the
 25 Federal Rules of Civil Procedure**

26 In addition to requesting that Judge Attack's rulings and decisions be declared null and
 27 void, plaintiff's complaint also requests that Judge Attack be disqualified from "... any case with
 28 [her] name on it . . .," pursuant to Cal. Code Civ. Proc., § 170.1(a)(6)(c). (Complaint, Page 4,
 29 lines 10-13). In support of this requested relief, plaintiff's complaint re-asserts her allegations
 30 that Judge Attack did not allow her a fair hearing or trial during the course of the state court

1 proceedings. (Complaint, Page 8, lines 23 to Page 9, line 8). However, a state court judge
 2 disqualification motion is not a viable claim for relief in federal court. Thus, it follows that even
 3 if all facts alleged in plaintiff's complaint were true, plaintiff would not be able to establish any
 4 cognizable legal theory against Judge Attack or show that she would be entitled to any legal
 5 remedy against Judge Attack. When such is the case, a Rule 12(b)(6) dismissal is proper. (See
 6 *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990)). A Rule 12(b)(6) motion
 7 to dismiss should be granted when the facts pleaded in plaintiff's complaint do not give rise to an
 8 actionable claim. (See *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990)).

9 Even if accepted as true, none of the above factual allegations asserted against Judge
 10 Attack in plaintiff's complaint give rise to any actionable claims and thus, any and all claims for
 11 relief alleged against Judge Attack in this action should be dismissed pursuant to Rule 12(b)(6).

12 **D. Judge Attack is Entitled to Judicial Immunity**

13 The Supreme Court long ago established the rule that judges are immune from civil suits
 14 arising out of the exercise of their judicial functions. (*Bradley v. Fisher*, 80 U.S. 335 (1871)).
 15 "It is a general principle of the highest importance to the proper administration of justice that a
 16 judicial officer, in exercising the authority vested in him, shall be free to act upon his own
 17 conviction, without apprehension of personal consequences to himself." (*Id.*, at 347).

18 As stated by the Supreme Court in *Pierson v. Ray*, 386 U.S. 547, 554 (1967):

19 Few doctrines were more solidly established at common law than the
 20 immunity of judges from liability for damages for acts committed
 21 within their judicial jurisdiction, as this Court recognized when it
 22 adopted the doctrine, in *Bradley v. Fisher*, 13 Wall. 335 (1872). This
 23 immunity applies even when the judge is accused of acting
 24 maliciously and corruptly, and it "is not for the protection or benefit
 25 of a malicious or corrupt judge, but for the benefit of the public,
 26 whose interest it is that the judges should be at liberty to exercise
 27 their functions with independence and without fear of consequences."
 28 (*Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher*, *supra*, 349, note, at 350.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

1 As indicated above, plaintiff's complaint asserts that Judge Atack did not allow her a fair
 2 hearing and violated her due process rights during the course of the state court proceedings in
 3 which she was a party. (Complaint, Page 8, line 23 to Page 9, line 8; Exhibit 1). Thus, the
 4 alleged conduct of Judge Atack falls squarely under the ambit of judicial immunity. As stated by
 5 the Court of Appeal in *Soliz v. Williams* 74 Cal. App. 4th at 592, the true test of whether judicial
 6 immunity is applicable is as follows:

7 The United States Supreme Court has adopted a two-pronged test for
 8 determining whether an act was "judicial" for absolute immunity from
 9 a suit for damages purposes: "Accordingly, judicial immunity is not
 10 overcome by allegations of bad faith or malice, the existence of which
 11 ordinarily cannot be resolved without engaging in discovery and
 12 eventual trial. *Pierson v. Ray* [(1967)] 386 U.S. [547,] 554
 13 ('[I]mmunity applies even when the judge is accused of acting
 14 maliciously and corruptly'). See also *Harlow v. Fitzgerald*, 457 U.S.
 15 800, 815-819 (1982) (allegations of malice are insufficient to
 16 overcome qualified immunity). [P] Rather, our cases make clear that
 the immunity is overcome in only two sets of circumstances. First, a
 judge is not immune from liability for nonjudicial actions, *i.e.*, actions
 not taken in the judge's judicial capacity. *Forrester v. White* [(1988)]
 484 U.S. [219,] 227-229; *Stump v. Sparkman* [(1978)] 435 U.S.
 [349,] 360. Second, a judge is not immune for actions, though
 judicial in nature, taken in the complete absence of all jurisdiction.
Id., at 356-357; *Bradley v. Fisher* [(1871) 80 U.S.] 13 Wall. [335,]
 351." (*Mireles v. Waco* (1991) 502 U.S. 9, 11-12 [112 S. Ct. 286,
 288, 116 L. Ed. 2d 9].)

17 Even as alleged in plaintiff's complaint, the only acts Judge Atack is alleged to have
 18 taken were performed in his official judicial capacity while presiding over the case of *System &*
19 Services Technologies, Inc. v. Beverly Thorp, Santa Cruz County Superior Court Case No. CV
 20 155983 (Complaint, Page 8, line 23 to Page 9, line 8; Exhibit 1), a case in which Judge Atack
 21 was clearly acting in his judicial capacity. Thus, even if plaintiff's allegations are assumed to be
 22 true, Judge Atack is entitled to judicial immunity and any and all claims for relief against him
 23 should be dismissed without leave to amend.

24 E. **Federal Court Jurisdiction over the Claims Against the State of California,
 25 its Entities, and Employees Acting in Their Official Capacity Is Barred
 by the Eleventh Amendment**

26 In addition to the grounds asserted above, this case should also be dismissed because
 27 claims against State of California officials acting in their official capacity are barred by the 11th
 28 Amendment.

1 The Eleventh Amendment (U.S. Const. Amend. XI) provides:

2 "[T]he judicial power of the United States shall not be construed to
3 extend to any suit in law or equity, commenced or prosecuted against
4 one of the United States by citizens of another state"

5 The Eleventh Amendment bars suits which seek either damages or injunctive relief against a
6 state, an arm of the state, its instrumentalities or its agencies. (*Durning v. Citibank, N.A.*, 950
7 F.2d 1419, 1422-23 (9th Cir. 1991)).

8 Claimed incursions into federal constitutional rights can only be vindicated through the
9 statutory remedy provided in 42 U.S.C. section 1983. (*Monroe v. Pape*, 365 U.S. 167 (1961);
10 *Mitchum v. Foster*, 407 U.S. 225 (1972)). "Section 1983 is not itself a source of substantive
11 rights, but merely provides a method for vindicating federal rights elsewhere conferred."
12 (*Albright v. Oliver*, 510 U.S. 266 (1994) (citations and internal quotations omitted)).

13 The United States Supreme Court has held that a state, as well as state entities, are not
14 "persons" within the meaning of section 1983 and, thus, are not subject to suit for damages under
15 section 1983. (*Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989); *Gilbreath v.*
16 *Cutter Biological, Inc.*, 931 F.2d 1320, 1327 (9th Cir. 1991)). Cal. Gov't Code § 900.6 defines
17 "State" to include the State and any office, officer, department, division, bureau, board,
18 commission or agency of the State claims against which are paid by warrants drawn by the
19 Controller. Eleventh Amendment immunity for state entities also extends to actions against
20 judicial officers who are sued in their official capacities (*Will v. Michigan Dept. of State Police*,
21 491 U.S. at 71; *Montero v. Travis*, 171 F.3d 757, 761 (2nd Cir. 1999); *Staich v. Schwarzenegger*,
22 (E.D. Cal. Aug. 8, 2006, No. CIV S-04-2167) 2006 U.S. Dist. Lexis 58929). Determining an
23 individual's capacity "is best understood as a reference to the capacity in which the state officer
24 is sued, not the capacity in which the officer inflicts the alleged injury." (*Hafer v. Melo*, 502 U.S.
25 21, 26 (1991)). Therefore, the Court must look to the complaint to classify an individual's
26 capacity. (*Ashker v. Cal. Dep't of Corrs.* 112 F.3d 392, 395 (9th Cir. 1997)). Although plaintiff
27 alleges that "[t]he Defendants were acting as individuals . . ." (Complaint, Page 4, lines 6 to 8)
28 and a complaint filed by a pro per is liberally reviewed in favor of the plaintiff (*Id.*), here,
 plaintiff's complaint never alleges any act or action performed by Judge Attack in his individual

1 capacity. In fact, plaintiff's complaint asserts that Judge Attack did not allow her a fair hearing
2 and violated her due process rights exclusively during the course of the state court proceedings in
3 which she was a party. (Complaint, Page 8, line 23 to Page 9, line 8; Exhibit 1). Thus, it is clear
4 that plaintiff is suing Judge Attack in his official capacity for alleged actions that occurred while
5 he presided over her state court case, and therefore, this suit is barred by the Eleventh
6 Amendment.

7 To the extent there exists any state claims in plaintiff's complaint, the Eleventh
8 Amendment also precludes a plaintiff from bringing pendent state-law claims against a state
9 official in federal court. (*Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106,
10 121 (1984)). Adhering to the Supreme Court's holding in *Pennhurst*, Ninth Circuit courts have
11 dismissed, on Eleventh Amendment grounds, pendent state-law claims brought against state
12 defendants in federal court. (*Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1327 (9th Cir.
13 1991); *Ulaleo v. Paty*, 902 F.2d 1395, 1400 (9th Cir. 1990)).

14 Given the bar of Eleventh Amendment immunity, Judge Attack requests the dismissal of
15 any and all of plaintiff's claims for relief against in this action.

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1 IV.
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3 **CONCLUSION**
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5 For the aforementioned reasons, Defendant Judge Robert Atack respectfully requests this
6 Court grant his motion to dismiss any and all of plaintiff's claims for relief against him pursuant to
7 Rules 12(b)(1) & 12(b)(6) of the Federal Rules of Civil Procedure of the Federal Rules of Civil
8 Procedure.

9 Dated: April 18, 2008.
10

11 Respectfully submitted,
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16 PAUL T. HAMMERNESS
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19 s/s Troy B. Overton
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26
27
28

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **THORP, Beverly v. Judge Robert Attack**

No.: **C 08-01449JF**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 18, 2008, I served the attached **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JUDGE ROBERT ATACK'S MOTION TO DISMISS [FRCP 12(b)(1) & 12(b)(6)]** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Beverly Thorp
c/o Box 2070
Sunnyvale, CA 94087

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 18, 2008, at San Francisco, California.

Rosalinda E. Asuncion

Declarant

s/s Rosalinda E. Asuncion

Signature